

Supreme Court, U. S.
FILED

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-24

PETER ROSENBRUCH,

Petitioner,

—against—

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 357 F. Supp. 982 and appears in the Appendix hereto as Exhibit 1. A District Court Order dealing with the issue of deviation is attached as not officially reported, and appears in Petitioner's Appendix B. The Opinion of the Court of Appeals, not yet reported, appears in Petitioner's Appendix A.

Jurisdiction

Respondent agrees with Petitioner's jurisdictional state-
ment. No issue is presented on this point.

Statement of Facts

Petitioner's statement of facts is so inadequate that we find it necessary to state them more fully.

Mr. Peter Rosenbruch, the Petitioner, hired an experienced international freight forwarder, the 7 Santini Brothers International, Inc., and its affiliate, Santini Brothers, Inc., (hereinafter "Santini Brothers") to handle the complete movement of his household goods and effects from Norwood, New Jersey, to Hamburg, Germany. The entire handling of the overseas movement, including the packing, trucking, insuring, arranging ocean carriage, passing customs clearance and other details were all to be handled by Santini Brothers. For packing household furniture, Santini Brothers had two services. One was to construct a large expendable wooden container at the expense of Rosenbruch. The other, was to use a metal container borrowed from the ocean carrier at no expense. Instead of constructing a large wooden van, Santini Brothers requested and was furnished by Container Marine Lines, a division of American Export, a 40' container #183333. The empty container was picked up by Santini Brothers and taken to Rosenbruch's New Jersey home at the shipper's expense. In addition, Santini constructed a small 11' wooden container to hold the balance of the household goods which would not fit in the 40' metal container.

On or about December 29, 1970, Santini Brothers delivered container #183333 to Norwood, New Jersey, and proceeded to pack Rosenbruch's household goods and effects into same, without the heavy boxing, crating or packings which would have been required to ship household goods by sea if a wooden van or metal container was not

available. The 40' container was to, and did serve, as the export protection as did the 11' wooden container constructed by Santini Brothers that appears on the same bill of lading. Upon completion of the packing of the furniture in the container, CMLU #183333, it was sealed by Santini Brothers with seal #4057-4058 and trucked to the pier. The 11' wooden container was "short-shipped" on the bill of lading, e.g. did not go forward on the same vessel, and is not involved in this case.

The service performed by Santini Brothers was described in their invoice as:

"Pick-up, pack for export in leased container and deliver to N.Y. pier". (Emphasis added)

Prior to the loading and sealing of the container, Santini Brothers made arrangements with American Export for shipment of the container of household goods to Hamburg aboard the container vessel, C.V. CONTAINER FORWARDER. The container vessel was scheduled to depart New York for Hamburg on or about January 9, 1971. In accordance with standard international freight forwarding operations, Santini Brothers, using the standard printed forms of Dock Receipts and Bills of Lading, supplied to Santini Brothers in blank by American Export, filled in the particulars of the shipment. The description on the dock receipt and the bill of lading were identical. In the column "No. of cont. or other pkgs.", the freight forwarder typed the numeral "1".

Once the necessary paperwork, including the filling in of the dock receipt and the bill of lading by Santini Brothers was completed, a Santini Brothers' truck picked-up container #183333 from New Jersey and delivered it to

Pier #13, at the container port at Staten Island on January 8, 1971.

The bill of lading was then submitted to the export documentation section of American Export for completion. The bill of lading was dated January 9, 1971, designated bill of lading No. 5. The carrier also at that time filled in the name of the vessel, "FORWARDER", which is an abbreviation for the container vessel C.V. CONTAINER FORWARDER, and placed a rubber stamp "SHIPPER'S LOAD AND COUNT", as well as crossing out Santini Brothers' remark: "Stow under deck only". The reason for this, as Santini Brothers knew, or should have known, if it had read the applicable tariff, was that Rule 13C of the North Atlantic Continental Freight Conference did not permit issuance of under deck bills of lading for containers. Santini Brothers accepted the change. Petitioner offered no evidence of any protest by Santini Brothers. As the bill of lading indicates (lower right side) the agreement took effect when the bill of lading was accepted.

On or about January 9, 1971, sealed container #183333 was loaded on board the container vessel, C.V. CONTAINER FORWARDER. The CONTAINER FORWARDER was a specifically designed container carrier approximately 583 feet long solely constructed for the carriage of 20 and 40 foot ocean shipping containers. The CONTAINER FORWARDER like other container vessels was fully equipped to carry containers on-deck by using special deck fittings, lashings and a strengthened weather deck high above the water.

Container No. 183333 was stowed on deck, along with numerous other containers for the trans-Atlantic crossing.

The vessel sailed from New York on or about January 9, 1971, with a full load of containers. During the course

of the trans-Atlantic crossing, extremely heavy weather was encountered and approximately 32 containers were damaged or lost over the side.

Although Petitioner states that the action was brought to recover \$102,917.09 "representing the value" of Rosenbruch's shipment, the parties stipulated that if the \$500 limitation did not apply, plaintiff's recovery by agreement was limited to \$35,000. (See footnote 4, Circuit Court Opinion, p. 17, Petition). Also, while the suit was brought in the name of Rosenbruch, cargo underwriters have an interest in the case, having paid Rosenbruch for part of his loss.

Lower Court Decisions

This action was brought in the United States District Court for the Southern District of New York in the name of Peter Rosenbruch, by Rosenbruch and his underwriters against American Export Isbrandtsen Lines, Inc., to recover for cargo admittedly lost in a trans-Atlantic crossing on board one of Respondent's container ships during a storm.

On December 7, 1972, a motion was filed requesting an Order granting partial summary judgment in favor of the ocean carrier limiting plaintiff's recovery to \$500 based on the package limitation provided both in the contract of carriage and by the U.S. Carriage of Goods by Sea Act, 46 U.S.C. Sec. 1304(5).

On December 19, 1972, plaintiff's attorney filed a cross-motion on behalf of Petitioner for summary judgment alleging that the defendant was guilty of a deviation and thus not entitled to any package limitation, or in the alter-

native, for summary judgment alleging the defendant was not entitled to limit its liability to \$500.

On March 15, 1973, after the District Court had heard extensive oral argument and reviewing briefs submitted by both parties, Judge Tyler limited plaintiff's recovery to \$500 based on the package limitation.

Petitioner's attorney, after studying the Opinion, requested and was granted a further oral argument on the question of whether the ocean carrier had committed an unreasonable deviation by stowing Petitioner's container on the weather deck of the C.V. CONTAINER FORWARDER. On March 23, 1973, Judge Tyler heard extensive oral argument from both parties involving the deviation issue. At the conclusion of the argument, Judge Tyler ruled from the bench that Petitioner's cross-motion for summary judgment must be denied in all respects and that Respondent's motion for partial summary judgment limiting plaintiff's recovery to \$500 be granted. An Order denying Petitioner's cross-motion was signed by the Court on March 27, 1973. (Petitioner's Exhibit B)

On April 19, 1976, the United States Court of Appeals for the Second Circuit unanimously affirmed the holding of the District Court in its Decision and also affirmed the Order dated March 27, 1973, on the deviation issue.

The relevant holdings in the District Court will be discussed below, along with the affirmance of the District Court's Opinion and Order by the United States Court of Appeals for the Second Circuit.

Questions Presented

We shall consider the "Questions Presented" in the same order as they appear in the Petition under "Reasons for Granting the Writ".

ARGUMENT

The Petitioner has gone to great lengths to spell out one issue that he believes to be of primary importance to the shipping industry as a whole. The question, as urged by Petitioner, involves the stowage of containers on decks of vessels specifically designed to carry containers on deck. Container vessels have been either converted or built specifically for such carriage as a result of the recent technical innovations in the field of ocean transportation. This statement of the issue is not only incorrect, but misleading.

A reading of the decisions in the two lower Courts will clearly set the issue presented by this Petitioner in the proper prospective. Neither Court found any evidence whatsoever of a deviation in the archaic or classic sense as used in Maritime law. The underlying issue that is really presented by this Writ is Petitioner's dissatisfaction with the Court's application of the package limitation provided by the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(5) as well as the contract of carriage. It is beyond dispute that Petitioner agreed to be bound by the contract of carriage without protest by accepting the bill of lading as corrected by the carrier to conform to the Conference Rules, and now attempts to avoid such statutory and contractual obligations by creating a question of deck

deviation that was never really a serious issue in either Court.

The granting of certiorari in this case will in no way have any general impact on the present operations necessarily fostered by containerization. The facts of the case are rather unique and were thoroughly considered by both the District Court and the Court of Appeals.

POINT I

***St. Johns N.F. Shipping Corp. v. Companhia Geral, etc.*, 263 U.S. 119 (1923) is not applicable in this case because the contract of carriage did not permit the ocean carrier to issue an under-deck stowage provision.**

Petitioner contends that the Court below made a clear mistake of law in not applying the holding of this Court in *St. Johns N.F. Shipping Corp. v. Companhia Geral, etc.*, 263 U.S. 119 (1923) (hereinafter referred to as *St. Johns*), that the issuance of a clean bill of lading amounts to a positive representation by the shipowner that an option in the contract has been exercised and that the goods will be carried under deck.

In the *St. Johns* case, the ocean carrier and shipper entered into a formal written and signed freight reservation agreement which expressly gave the ocean carrier the option to stow cargo on-deck or under-deck. The ocean carrier issued a clean bill of lading containing no reference to the freight agreement between the ocean carrier and the shipper and no statement that the goods were to be stowed on deck. The goods were jettisoned and lost in an emergency. This Court held that the issuance of a clean bill was, in effect,

an exercise of the option in favor of below deck stowage, and because the cargo was stowed on deck, there was a deviation which made the carrier liable for the loss of the goods. (The vessel was not, of course, a container vessel designed to carry containers on deck).

However, this Court was quick to point out that:

“[W]e are not dealing with a case arising under a general port custom permitting above deck stowage notwithstanding a clean bill, with notice of which all shippers are charged. When there is not such custom *and no express contract in a form available as evidence*, a clean bill of lading imports under deck stowage.” 263 U.S. at 124. (Emphasis added)

This Court noted that lacking such custom or an express contractual provision, the shipper had a right to rely upon the implication that the goods were to be stowed under deck. In other words, the shipowner had an option and if a positive representation was not made to the shippers that such option was exercised, the goods were presumed to be stowed under deck, at least as far as the shipper was concerned.

The *St. Johns* case is readily distinguishable from the present case in that there was, in the former, a separate written agreement for the option to carry on deck and no mention of such option in the bill of lading. However, in the relevant bill of lading, on its face is noted:

“ . . . it is further agreed containers may be stowed on deck as per clause 7.” (Respondent's Exhibit 1)

Clause 7 on the reverse side of the printed form bill of lading notes as follows:

"Goods may be stored in container(s). Container(s) may be stowed on deck (unless this bill of lading is claused 'stow under deck' on the face hereof) and when so stowed shall be deemed for all purposes to be stowed under-deck." (Petitioner's Exhibit B)

It is clear that from the holding in the *St. Johns* case that this Court held that some affirmative act on behalf of the shipowner to notify the shipper that the option to stow on deck was being exercised by the ocean carrier was a prerequisite to such stowage in light of the silence in the bill of lading as to on-deck stowage. In this case, the contract of carriage which is evidenced by the bill of lading, clearly states that containers may be stowed on or under deck. The reasons why such stowage must be variable are more fully set forth in Point II of this brief.

However, Clause 7 seems clear that no option situation existed as far as the stowage of containers on or under deck on a container vessel. The reason Clause 7 also contains an explanation for "stow under deck" is that the American Export Isbrandtsen Lines' bill of lading form, both then and now, is used for both container vessels and the conventional break-bulk vessels. Moreover, the rules of the Conference, applicable to carriers doing business on the North Atlantic operated as more than a "custom", as they were filed with the Maritime Commission and provided for penalties if the carrier violated them by issuing an under deck bill of lading to this one shipper, thus giving him a preference.

In fact, if one carefully reads the holding in the *St. Johns* case, it will be noted that this Court held that the contract of carriage as evidenced by the provisions in bills of lading

must govern and determine how the cargo is to be stowed and what effect a violation of such provisions would have on the ocean carrier.

Finally, the *St. Johns* case is not germane to the present case in that it did not involve a container carried on the deck of a sophisticated, specially designed and equipped container vessel that was solely constructed for that purpose. Furthermore, the case was decided prior to the enactment of the U.S. Carriage of Goods by Sea Act of 1936 as well as the newly enacted tariff provisions provided for the regulation of container carriages.

POINT II

The carriage of container No. 1833 on the weather-deck of the C.V. CONTAINER FORWARDER was not an unreasonable deviation under Section 1304(4) of COGSA.

Petitioner contends in its brief that the stowage and carriage of container #183333 on the weather-deck of the C.V. CONTAINER FORWARDER was an unreasonable deviation. This particular point was the subject of a separate hearing before District Court Judge Tyler on March 23, 1973. Judge Tyler allowed a further argument solely based on this question. Likewise, the Court of Appeals for the Second Circuit considered this issue separately and affirmed the findings and conclusions of the trial Judge. Petitioner's attorney in his petition contends that the shipper requested under-deck stowage either by the clausing of the bill of lading or by the fact that the bill of lading was "clean", importing such under-deck stowage. The Petitioner further contends that the carrier was guilty of an unreasonable

deviation because the carrier did not stow the container under-deck.

Judge Tyler, during the course of the oral argument held on March 23, 1973, noted that in his initial Opinion and Order, dated March 15, 1973, he considered the proviso "stow under deck only", but noted that the copy of bill of lading No. 5 supplied by the carrier had that proviso crossed out, indicating that it was to be disregarded. Judge Tyler notes in his Opinion:

"After this opinion was filed, it was pointed out that the bill of lading described above was in fact the carrier's office copy. The original has been submitted, varying from the above description in that the phrase 'stow under-deck only' is entirely blackened out and completely illegible. A copy of both the original and the office copy are appended to this opinion." (Respondent's Exhibit 1)

The original bill of lading referred to by Judge Tyler is found in the Appendix 12a. In fact, Petitioner's attorney on page 7 of the transcript of the March 23rd hearing states:

"I concede, your Honor, that stow under-deck was crossed out on the original bill of lading."

Now, Petitioner, in this Court, again attempts to raise this same issue of fact. This is pure nonsense and an attempt to squeeze the factual situation in this case into the previously discussed *St. Johns* case and the Second Circuit Court of Appeals decision in *Encyclopedia Britannica v. Hong Kong Producer*, 422 F. 2d 7 (2nd Cir., 1969) (hereinafter *Hong Kong Producer*). In that case, the shipper's

freight forwarder delivered to the S.S. HONG KONG PRODUCER at New York, an ordinary freighter, a shipment of eight containers for transportation to Yokohama, Japan. The carrier received the shipment on board and issued a short form bill of lading, which incorporated by reference, all of the provisions of the carrier's regular form bill of lading. One of the provisions, Clause 13, gave the carrier the option to stow the cargo on deck unless it was informed at some time prior to delivery, that below deck stowage was required. Six containers were stowed on the freighter's weather deck and the remaining two were stowed below deck. The shipper sought recovery for the damage sustained to the six containers stowed on deck. This Court held in that case, reversing the lower Court, that:

"A bill of lading that contains no statement that the goods are to be carried on deck is to be treated as a 'clean bill of lading' and therefore, importing below deck stowage." 422 F. 2d at 18.

Stowage of the six containers on deck, therefore, constituted an unreasonable deviation which meant that the carrier was deprived of the benefit of the \$500 per package limitation of liability provision contained in COGSA.

The Petitioner, in the instant case, urges this Court that there is no difference in the facts between the present case and the *Hong Kong Producer*. Petitioner brushes aside the controlling decision in the Second Circuit *Dupont de Nemours International S.A. v. S.S. Mormacvega*, 493 F. 2d 97 (2nd Cir., 1974) (hereinafter "*Mormacvega*"). In that case, cargo interests sued the owners of the S.S. MORMACVEGA for cargo loss in the approximate amount of \$110,000 for the loss overboard at sea of one container, containing

38 pallets of teflon. The principal question raised in this case was whether the stowage of a container on the deck of a containerized cargo vessel, under a clean bill of lading, constituted an "unreasonable deviation" pursuant to 46 U.S.C. 1304(5). The Court of Appeals held that in the case of unconventional stowage deviation is unreasonable when the carrier places it in an area of the ship not intended for stowage. 493 F. 2d at 103.

The Court determined that such infractions did not occur on board the S.S. MORMACVEGA, which was a containership equipped to carry containers on deck and concluded that no "unreasonable deviation" had occurred which would justify the ouster of the COGSA limitation liability.

The Court noted the practical problems of loading container ships:

"To determine whether a particular container would be stowed on or below deck, a procedure dictated primarily by the practical necessities of the trade and to some extent by chance is used. . . . Whenever possible, depending on the port of call at which a given container was to be unloaded and the time of its delivery for on-loading, heavier containers were stowed below to maintain optimum stability of the vessel. Containers with flammable or explosive materials generally were stowed on deck. Cargo which was likely to suffer from exposure to the elements was stowed below to the extent possible. Cargo which was delivered to the pier after the loading process had begun, of necessity was stowed on deck." 493 F. 2d at 99.

The basis for the holding in the *Mormacvega* case resulted from the interpretation of the now famous footnote 12 in the *Hong Kong Producer*, which states:

"The defendant repeatedly makes the reference to the fact that the so-called 'container ships' carry containers on deck. The fact has no bearing on the propriety of deck stowage in the present case. A 'container ship' is specially outfitted safely to stow containers on deck. The Hong Kong Producer is a general cargo vessel and has no special rigging for the purpose. *What may be an established custom for a container ship is not the custom in the port for general cargo vessels.*" (Emphasis added.) 422 F. 2d at 18.

The Court of Appeals in the *Mormacvega* case, after reviewing the entire area of law involved in what constitutes an unreasonable deviation, found that in view of the special construction of the vessel the deck stowage of the DuPont container was excusable, justifiable and therefore reasonable, within the meaning of Section 1304(4) of COGSA.

In the instant case, Container #183333 was stowed on the deck of the C.V. CONTAINER FORWARDER. The CONTAINER FORWARDER was converted to a complete container carrier in 1966 and 1967. The entire vessel was converted solely for the purpose of carrying twenty and forty foot containers.

The C.V. CONTAINER FORWARDER was not a small cargo schooner or freighter like the ST. JOHNS N.F. or the HONG KONG PRODUCER, but was rather a full container vessel, even more so than the MORMACVEGA.

However, Judge Tyler's Order was not based on the yet undecided Court of Appeals decision in the *Mormacvega*

case, but rather based on the actual contract of carriage as set forth in Clause 7 of bill of lading No. 5, found at page 8a of this brief.

Again, it should be noted that on the face of the printed bill of lading, it is noted in the "Acceptance" clause that "Containers may be stowed on Deck, as per Clause 7."

The trial Judge, also found that before the signing of the bill of lading, which is evidence of the contract of carriage, the carrier blocked out in solid black ink the words, "Stow under-deck only", so that it became illegible on the shipper's copy. The lower Court also found that *Santini Brothers accepted the bill of lading as changed without protest*.

The Respondent, American Export Lines, Inc., is a member of the North Atlantic Continental Freight Conference and is subject to the tariff rules and regulations of that Conference filed with the Federal Maritime Commission as Freight Tariff 29 FMC-4. Both lower Courts found that the CONTAINER FORWARDER was subject to this Conference as the vessel was trading in the area of the North Atlantic Conference's jurisdiction. The tariff rules and regulations contain a Trailer/Container Traffic General Rule No. 13(C), which provides as follows:

"Since it is necessary that Containers be stowed on or under deck at the Member Lines' option, Bill of Lading specifically claused provides under deck stowage will NOT be issued."

Both lower Courts found that as a result of this regulation, the carrier could not issue "under-deck" bills of lading.

It is important to note that the regular American Export Lines' form bill of lading prepared by Santini Brothers incorporated the Conference Rules. Clause 19 of the bill of lading reads as follows:

"19. Any bookings, freight engagements, or other agreements relating to the shipment previously made are superseded by this bill of lading and by the Carrier's Freight Tariff Rules and Regulations, which shall be deemed incorporated herein as if set forth at length. The Carrier's Freight Tariff Rules and Regulations are filed with the Maritime Commission, Washington, D.C. and are also available at any of the Carriers' offices".

The leading admiralty commentators, Professors Gilmore and Black, in their second edition of the *Law of Admiralty* (1975) at Page 183, explain why container vessels cannot promise under deck stowage:

"Most containers are designed to be carried safely on deck, and, for technical reasons of ship's balance, and loading and unloading, it can not be foretold which of the ship's load of containers it will be necessary to carry on deck. It is therefore often (if not normally), impossible to issue a 'below deck' bill of lading at the time of receipt of the container. On the other hand, the issuance of an 'on deck' bill takes the goods out of the protection of COGSA, and so impairs or destroys the commercial acceptability of the bill of lading—and may turn out to have been quite unnecessary, since in fact the container may be carried below-deck".

See also, Bissell, "The Operational Realities of Containerization, etc.", 45 Tulane Law Review 902, 917-920 (1971).

Santini Brothers, as professional freight forwarders, knew or should have known that the request for an under-deck bill of lading was contrary to the Rules. Granting Santini Brothers' request would have resulted in the type of discrimination that is prohibited by the Shipping Act of 1916.

Section 14 of the Shipping Act of 1916, 46 U.S.C. Section 812 (1975) prohibits in general an ocean carrier from engaging in any unfair or discriminating practices.

In fact, the Second Circuit Court of Appeals has stated in *Grace Lines, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2nd Cir., 1960) *cert. denied*, 364 U.S. 933 Section 14, that an ocean carrier can not discriminate against any shipper in the matter of cargo space or location or give any undue or unreasonable preference or advantage to a particular shipper. This would have most certainly been the case if *Rosenbruch* had been granted such a preference.

Therefore, in addition to the contractual provisions found in the bill of lading and the prohibition found in the Conference Tariff, Section 14 of the Shipping Act of 1916 would also have proscribed any prearranged stowage below deck on a container vessel such as the C.V. CONTAINER FORWARDER.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

Respondent's Exhibit 1

UNITED STATES DISTRICT COURT

S. D. NEW YORK

March 15, 1973.

PETER ROSENBRUCH,

Plaintiff,

—v.—

AMERICAN EXPORT ISBRANDTSEN LINES INC.,

Defendant.

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Haight, Gardner, Poor & Havens by M. E. DeOrchis, New York City, for defendant.

OPINION

TYLER, *District Judge.*

This is a suit in admiralty to recover \$102,917.08 for cargo admittedly lost in trans-Atlantic transit. The facts are not in dispute, and the parties have cross-moved for partial summary judgment on the issue of limitation of liability, posing another variant of the package limitation issue considered recently by the courts of this circuit in, among others, the cases of *Leather's Best, Inc. v. S.S. MORMACLYNX*, 451 F.2d 800 (1971), and *Royal Typewriter Co., Division of Litton Business Systems, Inc. v. M/V KULMERLAND*, 346 F.Supp. 1019 (S.D.N.Y. 1972).

THE FACTS

Desiring to transport his household goods from New York to Hamburg, plaintiff-shipper contracted with the Seven Santini Bros., Inc. ("Santini"), a firm of international movers, which in turn arranged for carriage on Voyage 42 of the SS CONTAINER FORWARDER, a ship designed only for container carriage, and used by its owners and operators, defendant American Export Isbrandtsen Lines, Inc. ("Export"), for New York-Northern Europe crossings.

Santini requested and was furnished without charge a container, No. 183333, measuring the standard 40' x 8' x 8', by Container Marine Lines, a division of Export. Overland movement of No. 183333 was at shipper's expense. Santini loaded and sealed the container and delivered it to Export in New York City. A bill of lading dated January 8, 1971 was made out, with Rosenbruch as the consignee.

The bill of lading indicated under the column entitled "No. of Cont. or Other Pkgs." the number 1, and the words "shipper's load and count" were stamped in block letters under the typed-in description of the goods to be transported. Also on the bill, written in by Santini, was the proviso "stow under deck only". This the carrier subsequently crossed through, apparently indicating that it was to be disregarded.^a

No. 183333 was in fact stowed, not under deck, but on a weather deck, and it, along with 31 other containers similarly stowed, was lost when the SS CONTAINER FORWARDER encountered heavy seas en route to Hamburg.

^a After this opinion was filed, it was pointed out that the bill of lading described above was in fact the carriers' office copy. The original has been submitted, varying from the above description in that the phrase "stow under deck only" is entirely blacked out and completely illegible. A copy of both the original and the office copy are appended to this opinion. See Appendix A.

On these facts plaintiff seeks to recover \$102,917.08, the asserted value of the cargo shipped. Defendant, while not admitting liability, claims that container No. 183333 qualifies as a "package" under § 4(5) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C.A. § 1304(5), which by its express terms would limit any recovery in this case to \$500. Summary judgment, more in the nature of declaratory relief at this point in the proceedings, is prayed by both parties as to the applicability of § 4(5).

I

Section 4(5) of COGSA is a theoretically straightforward provision, designed to prevent carriers, presumed to have the superior bargaining position, from contracting altogether out of liability for cargo loss or damage. A lower limit in this regard of \$500 per "package" is imposed.¹

But § 4(5) was enacted in 1936, well before the advent of container shipping, when \$500 at least approximated the value of the average parcel shipped. Today, as a result of the widespread movement by the world's merchant marine to "containerization", large numbers of parcels are placed in a single container, a metal box normally measuring 40' x 8' x 8', before being loaded on board ship.²

The inevitable question, whether a container is a package for § 4(5) purposes, was considered most recently by the Court of Appeals for the Second Circuit in *Leather's Best*,

¹ 46 U.S.C. § 1304(5) (1936) provides:

"(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

² See e. g. Affidavit of Seymour Simon, Exhibits 2a, b and c.

Inc. v. SS MORMACLYNX, 451 F.2d 800 (1971), where it was determined that it was not. The container there was delivered to the shipper under the supervision of the carrier's agent, the truck driver.³ The driver gave the shipper a receipt indicating the number of parcels loaded, and the bill of lading itself bore the typed-in notation "1 container s.t.c. 99 bales of leather."⁴

These facts, it was held, indicated the understanding of all concerned that the individual bales were the packages shipped, and that the container was essentially a device for the carrier's convenience in handling and stowage.⁵ And, also found relevant, the carrier therein could not deny knowledge of both the nature of the cargo and number of packages employed to ship it.⁶

Less participation by the carrier or less knowledge on its part as to the contents of a container, the opinion noted, would present an entirely different case.⁷ Chief Judge Friendly, writing for the court, expressly set out as possible material variations the shipper packing a container already on its premises and receiving for it a bill of lading reciting only 1 under the column left open for number of packages and cargo description.⁸

Just such variations, and others, were presented to this court, and, coincidentally, this writer, in *Royal Typewriter Co., Division of Litton Business Systems, Inc. v. M/V*

³ 451 F.2d at 804. The court specifically determined the trucker to be the agent of the carrier, as the carrier had engaged him.

⁴ "s.t.c." corresponds to "said to contain".

⁵ 451 F.2d at 815-816.

⁶ 451 F.2d at 815. Note that loading of the container took place at the factory of the seller of the cargo. This would substantiate to the carrier, through its agent the trucker, the shipper's description of the merchandise.

⁷ 451 F.2d at 815.

⁸ *Id.*

KULMERLAND, 346 F.Supp. 1019 (S.D.N.Y. 1972). The container lost there belonged to the shipper's agent, who had loaded and sealed it before delivering it to the carrier. The bill of lading given the shipper recited only "one container said to contain machinery," and the container itself was smaller than the typical ship's container, as here, which, as was pointed out, rendered it susceptible to confusion with typical cargo crates.⁹

It was clear in KULMERLAND that the container was intended by the shipper to be the basic cargo unit, and equally clear that the carrier had not been put on notice as to the nature and value of the goods it was transporting.¹⁰ The container, therefore, was held to be a "package" for § 4(5) purposes.

The case at bar, however, cannot fairly be said to fall under either of the extremes represented by KULMERLAND and *Leather's Best*. As in KULMERLAND, the shipper alone loaded the container; the bill of lading indicated only "1" under the entry "Number of Cont. and Other Pkgs.," and the cargo description was simply, "said to contain household good." Reminiscent of *Leather's Best*, the container was of the more typical 40' x 8' x 8' dimensions, owned by the carrier and furnished at the shipper's request.

This case, however, closely approximates the intentionally undecided hypothetical set out by Judge Friendly, varying only in that Santini did not own No. 183333, nor have it "already on its premises."¹¹

Ownership or possession in and of itself, cannot be dispositive of this case. It, along with the entire record must

⁹ 346 F.Supp. at 1024.

¹⁰ 346 F.Supp. at 1024-1025.

¹¹ 451 F.2d at 815.

be considered, and inferences drawn as to the knowledge of the shipper and carrier—and the mutual understanding of the parties.

To say this, however, brings the analysis around full circle, as the facts of this case do not realistically imply the outcome. Other factors must be considered: specifically, uniformity of result and simplicity of application.

The issue can first be narrowed by pointing out that it is solely with a container holding the goods of a single shipper that this opinion is concerned.¹² Only in this circumstance can any question of the shipper's intent arise. Moreover, it is only where the shipper packs the container or requests the carrier to do so that it becomes necessary to consider whether or not there was a "single package" under § 4(5). The carrier cannot unilaterally limit its liability by taking bales delivered it by a shipper and, on its own initiative, containerize them.

Given these circumstances, however, predictability can obtain. Judge Hays in his dissent in *Encyclopaedia Britannica, Inc. v. Hong Kong Producer*, 422 F.2d 7, at 20 (2d Cir. 1969), would achieve this by deeming a container, where these conditions are met, a § 4(5) package.¹³ I agree.

The choice between so applying § 4(5), or the alternative, to ignore the container and count the contents, is grounded on several considerations. The accident of notations on the bill of lading as to package count is too uncertain to govern. Problems of proof would inhere, and shippers inevitably would be tempted to minimize package size to increase potential compensation.

¹² See 451 F.2d at 815, citing the dissenting opinion of Judge Hays in *Encyclopaedia Britannica, Inc. v. Hong Kong Producer*, 422 F.2d 7 at 20 (2d Cir. 1969), cert. denied, 397 U.S. 964, 90 S.Ct. 998, 25 L.Ed.2d 255 (1970).

¹³ See also, *Leather's Best*, *supra*, 451 F.2d at 815.

More important, however, is the question of insurance. Viewing the issue from the insurance vantage point, the choice is between requiring the carrier to increase its coverage and pass on the costs of same to all shippers, even those who prefer cheaper rates and higher risks, and granting the option to the shipper to obtain that coverage he requires. COGSA, while pre-dating containers, did not pre-date marine insurance. This choice was before the Congress, and, on examination of the terms of § 4(5), I conclude that the legislature opted for the second alternative.¹⁴

To summarize, the present record reveals that the selection of Voyage 42 and the SS CONTAINER FORWARDER was made by Santini as shipper's agent; and that Santini requested use of carrier's container, with the proviso that the container hold only shipper's goods. No showing has been made that the carrier was unduly involved in the preliminary operations, as it was in *Leather's Best*. It is ruled, therefore, that container No. 183333 is a package for the purposes of § 4(5) of COGSA, 46 U.S.C. § 1304(5). Defendant's motion for summary judgment on this point is granted, and, perforce, that of plaintiff is denied.

It is so ordered.

¹⁴ See text of statutory provisions at fn. 1; see also, of course, paragraph 17 of the applicable bill of lading set forth in Appendix B hereto; see the similar language contained in the bill of lading pertinent in *Leather's Best*, *supra*, at 805-806.

APPENDIX B

17. In case of any loss or damage to or in connection with goods exceeding in actual value the equivalent of \$500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per shipping unit, the value of the goods shall be deemed to be \$500 per package or per shipping unit. The Carrier's liability if any, shall be determined on the basis of a value of \$500 per package or per shipping unit or pro rata in case of partial loss or damage, unless the nature of the goods and a valuation higher than \$500 per package or shipping unit shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra charge paid. In such case if the actual value of the goods per package or per shipping unit shall exceed such declared value, the value shall nevertheless be deemed to be declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value. The words "shipping unit" shall mean each physical unit or piece of cargo not shipped in a package, including articles or things of any description whatsoever, except goods shipped in bulk, and irrespective of the weight or measurement unit employed in calculating freight charges.

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